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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDY DEAN ABEGG,

Defendant and Appellant.

D074568

(Super. Ct. No. RIF1404581)

APPEAL from a judgment of the Superior Court of Riverside, Charles J. Koosed,  
Judge. Affirmed.

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General,  
Arlene A. Sevidal and Andrew Mestman, Deputy Attorneys General, for Plaintiff and  
Respondent.

Andy Dean Abegg appeals from the judgment following a jury verdict that found him guilty of one count of first degree murder (Pen. Code, § 187, subd. (a)) and a jury finding that he personally used a deadly and dangerous weapon, namely a bat, during the commission of the crime (Pen. Code, §§ 12022, subd. (b)(1), 1192.7, subd (c)(23)).

Abegg contends that, by instructing the jury according to CALCRIM No. 625, the court erroneously precluded the jury from considering evidence of Abegg's voluntary intoxication in deciding whether Abegg had an honest but unreasonable belief in the need to act in self-defense. Abegg further contends that the prosecutor committed misconduct during closing argument to the jury by misstating the law regarding both premeditation and provocation; and as a related argument, Abegg suggests that if his trial attorney failed to preserve his prosecutorial misconduct claim on appeal, then he received ineffective assistance of counsel at trial. We disagree, as we explain, on the following grounds: The court's use of CALCRIM No. 625 properly stated the law, since evidence of a defendant's voluntary intoxication cannot be used to support a defense claim of lack of express malice based on an unreasonable belief in the need to act in self-defense; Abegg forfeited appellate consideration of his claims of prosecutorial misconduct by not objecting to and seeking jury admonitions at trial regarding what Abegg characterizes as the prosecutor's misstatements of law; and Abegg has not established ineffective assistance of counsel at trial, because the record in this direct appeal does not affirmatively disclose that trial counsel had no rational tactical purpose for failing to object and/or request jury admonitions.

Accordingly, we affirm the judgment.

## I. PROCEDURAL BACKGROUND

In an amended information, the district attorney charged Abegg with one count of premeditated murder. (Pen. Code, § 187, subd. (a).) The district attorney alleged that, during the commission of the murder, Abegg personally used two different deadly and dangerous weapons—namely, a knife and a bat—within the meanings of Penal Code sections 12022, subdivision (b)(1), and 1192.7, subdivision (c)(23).

Following trial, a jury convicted Abegg of first degree murder and found true the allegation that Abegg used a bat during the commission of the murder. The jury did not reach a decision on the allegation that he used a knife during the murder; and the trial court declared a mistrial, later dismissing the allegation.

The court sentenced Abegg to an indeterminate term of 25 years to life on the murder conviction, plus a consecutive one-year term on the weapon enhancement. The court also applied credits, imposed conditions, and assessed specified fees, fines, and penalties, but made a finding that Abegg was unable to pay.

Abegg timely appealed.

## II. FACTUAL BACKGROUND

We generally review and recite the record in a light most favorable to the judgment, presuming all facts in support of the judgment that the jury could reasonably deduce from the evidence. (*People v. Powell* (2018) 5 Cal.5th 921, 944 [sufficiency of evidence review].) However, where the issue on appeal is whether the defendant was entitled to have the jury instructed on a specified affirmative defense, we recite the evidence in support of the potential defense in a light most favorable to the defendant.

(*People v. Mentch* (2008) 45 Cal.4th 274, 290.) As we explain at part III.A., *post*, for purposes of analyzing the argument whether Abegg was entitled to a voluntary intoxication instruction based on an honest but unreasonable belief in the need for self-defense (at times, imperfect self-defense), we will assume that Abegg presented substantial evidence to support his claim. Thus, for purposes of the remaining issues on appeal, we will present the facts in a light most favorable to the judgment. (See *Powell*, at p. 944.) Given the scope and disposition of these remaining issues, there is no need to go into great detail describing the facts.

In April 2014, V.G. and her boyfriend, J.M., lived in Lake Elsinore in Riverside County. On April 14, 2014, V.G. and J.M. wanted V.G.'s adult son, Abegg, to help them dig a pit in V.G.'s yard. To this end, V.G. and J.M. walked to a liquor store about a mile away from their residence both to buy liquor and to look for Abegg, who was usually in that part of town. They found him, and Abegg agreed to help dig the pit in exchange for providing him liquor. Upon leaving the liquor store, the three of them walked directly to V.G.'s home.

When they arrived at V.G.'s home, they sat in the living room and began drinking. Without warning or provocation, Abegg stood up and began talking what V.G. described as "a bunch of gibberish," which included calling her insulting names. V.G. was shocked, and J.M. told Abegg to leave. Abegg stood up, but otherwise did not react; meanwhile, J.M. became angry, repeated his demand that Abegg leave, stood up, and left the room. When J.M. left the living room, Abegg went over to where J.M. had left his whiskey and chugged almost half the bottle.

J.M. returned to the living room, holding a silver (aluminum) baseball bat that he kept under the bed at V.G.'s home. With full strength, J.M. twice swung the bat at Abegg, telling Abegg to leave. Abegg lunged forward and with both hands grabbed the bat from J.M. Taking a full-force swing, Abegg then hit J.M. in the face. While in the living room, J.M. fell to the floor; and as he got back up and made his way to the dining room, Abegg hit J.M. with the full force of the bat at least four times—two or three times to his head and at least once to his chest—before J.M. ended up stumbling to a chair in the dining room. Abegg again hit J.M. in the head with the bat as J.M. sat in the chair.

V.G. grabbed the bat from Abegg and ran outside.

The neighbors heard "blood curdling screams," and when one went outside, he saw his roommate pulling a baseball bat out of V.G.'s hands. The neighbor called 911, and J.M. was transported to the hospital, where he died three days later on April 17, 2014.

J.M. suffered three separate blunt force impact injuries to the side of his head. These injuries were consistent with having been hit in the head with a bat. In addition, J.M. also suffered a sharp force injury caused by a five and a half-inch knife blade that was embedded in J.M.'s right eye socket leading into his brain.<sup>1</sup> Both the blunt force impact injuries and the sharp force injury were life threatening, and either one alone was sufficient to cause J.M.'s death.

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<sup>1</sup> There was no testimonial or forensic evidence that linked Abegg to the knife.

### III. DISCUSSION

In his appeal, Abegg presents two principal issues: (1) whether the trial court erred in instructing the jury according to CALCRIM No. 625, which does not allow the jury to consider voluntary intoxication as the cause of an imperfect self-defense—i.e., whether Abegg's intoxication caused Abegg to have an honest but unreasonable belief in the need for self-defense; and (2) whether the prosecutor committed misconduct or error<sup>2</sup> in misstating the law during his closing argument. As we explain, Abegg has not met his burden of establishing reversible error based on either of the issues: (1) After the filing of Abegg's opening brief, our Supreme Court ruled that evidence of a defendant's voluntary intoxication cannot be used to support a defense based on an honest but unreasonable belief in the need to act in self-defense; and (2) Abegg forfeited appellate consideration of his claim of prosecutorial error because his trial attorney failed to object and/or request jury admonitions at the time of the alleged error, and the record on appeal does not establish that this failure amounted to ineffective assistance of counsel.

#### A. *The Trial Court Correctly Instructed the Jury on Voluntary Intoxication*

Based on CALCRIM No. 625, the trial court instructed the jury that, although it could consider voluntary intoxication for purposes of deciding whether Abegg acted "with an intent to kill" or "with deliberation and premeditation," it could not consider voluntary intoxication "for any other purpose":

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<sup>2</sup> "[T]he term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error." (*People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 (*Hill*).)

*"You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill or the defendant acted with deliberation and premeditation. [¶] A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect or willingly assuming the risk of that effect. You may not consider evidence of voluntary intoxication for any other purpose."* (Italics added.)

On appeal Abegg argues that this instruction does not properly state the law.

According to Abegg: Imperfect self-defense negates express malice, and evidence of voluntary intoxication is admissible as to a finding of express malice; thus, the instruction on voluntary intoxication erroneously precluded the jury from considering voluntary intoxication in determining whether Abegg acted in imperfect self-defense.

We review de novo whether a jury instruction correctly states the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

In his opening brief, Abegg relied on the Court of Appeal's opinion in *People v. Soto* (2016) 248 Cal.App.4th 884 (CALCRIM No. 625 *improperly* precluded jury from considering evidence of voluntary intoxication in connection with imperfect self-defense), review granted, October 12, 2016, S236164. In April 2018, after Abegg filed his opening brief, our Supreme Court disagreed, holding that evidence of voluntary intoxication *cannot* be used to support a defendant's claim of lack of express malice based on an imperfect self-defense (i.e., based on an unreasonable belief in the need to act in self-defense. (*People v. Soto* (2018) 4 Cal.5th 968, 970 (*Soto*)).)

In their brief on appeal, the People fully discussed the Supreme Court's opinion in *Soto, supra*, 4 Cal.5th 968.

In his reply brief, Abegg argues that, for various reasons, *Soto* "should be reconsidered." While we understand Abegg's desire, in the words of his appellate counsel, "to preserve [the issue] for further review in the state and federal courts," we are not in a position to reconsider *Soto*. To the contrary, our high court has directed that " 'a holding of the Supreme Court binds all of the lower courts in the state, including an intermediate appellate court.' " (*K.R. v. Superior Court* (2017) 3 Cal.5th 295, 308.) That is because "Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of *stare decisis* makes no sense. The decisions of th[e Supreme C]ourt are binding upon and must be followed by all the state courts of California. . . . Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction." (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Very simply, as an intermediate appellate court, our function is *not* "to attempt to overrule"—or, as suggested by Abegg, to reconsider—decisions of our high court. (*Ibid.*)

Accordingly, given *Soto*, *supra*, 4 Cal.5th 968, the trial court did not err in failing to instruct the jury that evidence of a defendant's voluntary intoxication cannot be used to support a defense claim of lack of express malice based on an unreasonable belief in the need to act in self-defense. (*Id.* at p. 970.)

B. *Abegg Forfeited Appellate Consideration of his Claim of Prosecutorial Error*

Abegg argues that, during his closing argument, the prosecutor committed error by misstating the law of premeditation<sup>3</sup> and the law of provocation.<sup>4</sup> Anticipating the People's argument that Abegg forfeited appellate review of this issue by his trial attorney's failure to object and seek admonitions, Abegg further contends that his trial attorney rendered ineffective assistance of counsel by failing to object to the prosecutor's statements.

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<sup>3</sup> In arguing that Abegg committed first degree murder, the prosecutor told the jury that it must "look at willful[ness], deliberation, and premeditation" and suggested that there is no requirement that there have been a long period of time in which Abegg thought about the attack on J.M.: "You're to consider any evidence that shows he thought about it before he did it. There is no time requirement. There's no time requirement for whether or not it's premeditation and deliberation. He does not have to think about this for long periods of time. He can consider it and weigh his options in seconds—and we do this all the time. This is not some foreign concept that you just see here in the jury room that you're unfamiliar with. No. [¶] Take this. You're approaching the stoplight. It turns yellow. You got to make a decision. Am I going to go through this light and risk there being a police officer there and get a ticket, or am I going to stop? [¶] How fast do you make that choice? Like that. It happens within seconds. You weigh and consider the options, you consider what you are going to do, and you made a decision within seconds. Ladies and gentlemen, that's all it is. That's the amount of time it takes."

<sup>4</sup> In arguing that a sudden quarrel or provocation can reduce murder to voluntary manslaughter, the prosecutor gave an example of a defendant who came home to find a close relative being raped. Under these circumstances, the prosecutor suggested that, if the defendant killed the attacker in a violent rage, such a response would be reasonable. The prosecutor then argued that Abegg's conduct was murder, not manslaughter, because the facts in the case under consideration were not as extreme as in the hypothetical: "There has to be sufficient provocation by [J.M.], the kind that would cause all of us to kill. [J.M.] must have provoked [Abegg] to a murderous rage, and a reasonable person would also be provoked to act from passion rather than judgment. [¶] Ladies and gentlemen, you don't have that here."

Although prosecutors "are given significant leeway in discussing the legal and factual merits of a case during argument . . . , 'it is improper for the prosecutor to misstate the law[.]' "<sup>5</sup> (*People v. Centeno* (2014) 60 Cal.4th 659, 666, citation omitted, (*Centeno*); accord, *People v. Cortez* (2016) 63 Cal.4th 101, 130.) A prosecutor violates the federal Constitution when his or her comments "constitute a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." (*Cortez*, at p. 130; accord, *Hill, supra*, 17 Cal.4th at p. 819.) Improper comments falling short of this test under federal law nevertheless may constitute error under state law if they involve "use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*Cortez*, at p. 130; accord, *Hill*, at p. 819.)

For purposes of this part III.B. of the opinion only, we will assume without deciding that, during his closing argument, the prosecutor misstated the law regarding both premeditation and provocation, as argued by Abegg.

Nonetheless, " '[a] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety.' " (*Centeno, supra*, 60 Cal.4th at p. 674; see 5 Witkin & Epstein, Cal.

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<sup>5</sup> Abegg was charged with murder. To obtain a conviction of first degree murder, the prosecution must prove premeditation. (Pen. Code, § 189; see *People v. Anderson* (1968) 70 Cal.2d 15, 26.) Provocation (or unreasonable self-defense) consists of mitigating facts which, if proven by the defendant, " 'negat[es]' the malice required for murder or . . . caus[es] that malice to be 'disregarded' "—reducing the crime to voluntary manslaughter, a lesser included offense of murder. (*People v. Bryant* (2013) 56 Cal.4th 959, 968.)

Crim. Law (4th ed. 2012), Criminal Trial, § 758, p. 1180.) Stated differently, "a necessary prerequisite to preserve a claim of prosecutorial misconduct for appeal" is that the defendant "mak[e] a timely and specific objection at trial, and request[] the jury be admonished[.]" (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1328 (*Seumanu*).) The purpose of such a requirement " 'is to give the trial court an opportunity, through admonition of the jury, to correct any error and mitigate any prejudice' " (*ibid.*), since "[a] prosecutor's misstatements of law are generally curable by an admonition from the court." (*Centeno*, at p. 674.) Accordingly, a failure to object may be excused only if the defendant's objection would have been futile or if an admonition would not have cured the harm caused by the prosecutor's error. (*Ibid.*)

On the present record, trial counsel's failure to object and to request an admonition forfeited appellate review of the issue. Nothing in the record here indicates that an objection would have been futile. Nor was the prosecutor's argument so extreme or pervasive that a prompt admonition could not have cured any potential harm.

Foreseeing this potential ruling, Abegg seeks a reversal on the basis that his trial attorney's failure to object was ineffective representation. As we explain, Abegg has not met his burden of establishing a claim for ineffective assistance of counsel in this direct appeal.

" 'A defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel's inaction violated the defendant's constitutional right to the effective assistance of counsel.' " (*Centeno, supra*, 60 Cal.4th at p. 674.) In asserting such an argument, however, the aggrieved defendant "must show

*both* that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney *and* that counsel's deficient performance resulted in prejudice to defendant in the sense that it 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " (*People v. Kipp* (1998) 18 Cal.4th 349, 366 (*Kipp*), italics added, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 686.) If the defendant is unable to establish *both* of these factors " 'we shall presume that "counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy." ' " (*Centeno*, at pp. 674-675.)

Because " '[t]he decision facing counsel in the midst of trial over whether to object to comments made by the prosecutor in closing argument is a highly tactical one[,] . . . 'a mere failure to object to evidence or argument seldom establishes counsel's incompetence.' " (*Centeno, supra*, 60 Cal.4th at p. 675, citation omitted.) For this reason, "a case in which the mere failure to object would rise to such a level as to implicate one's state and federal constitutional right to the effective assistance of counsel would be an unusual one." (*Seumanu, supra*, 61 Cal.4th at p. 1312.)

In a direct appeal, as here, to succeed on a claim that trial counsel's performance was deficient, the record must " 'affirmatively disclose[] that [trial] counsel had no rational tactical purpose' " for failing to object and/or request jury admonitions. (*People v. Zapien* (1993) 4 Cal.4th 929, 980.) Since an attorney may well have a tactical reason for declining to object, " ' "[i]f the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of

counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation." ' ' " (*Seumanu, supra*, 61 Cal.4th at pp. 1312-1313; accord, *Centeno, supra*, 60 Cal.4th at p. 675.) The record here sheds no light on why Abegg's trial counsel failed to object; counsel was not asked for an explanation; and a simple explanation is that trial counsel "may have desired not to highlight the [prosecutor's closing argument] by making an objection" (*Seumanu*, at p. 1313). Thus, in this direct appeal, Abegg has not shown that his trial attorney's "performance was deficient when measured against the standard of a reasonably competent attorney" as required by *Kipp, supra*, 18 Cal.4th at page 366.

In addition, Abegg has not established that his trial attorney's performance resulted in prejudice. The court instructed the jury that statements by counsel are not evidence (CALCRIM No. 222) and that, if the jury believes counsel's "comments on the law" are in conflict with the court's instructions, the jury "must follow [the court's] instructions" (CALCRIM No. 200). Abegg does not argue that the court's instructions in these regards were inaccurate, and appellate courts "presume jurors understand and follow the instructions they are given." (*People v. Buenrostro* (2018) 6 Cal.5th 367, 431.) Thus, even if we were able to determine on the present record that Abegg's trial counsel's assistance was deficient based on his failure to object to the prosecutor's statements set forth at footnotes 3 and 4, *ante*, given the court's instructions, defense counsel's deficiency did not " 'so undermine[] the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result' " as required by *Kipp, supra*, 18 Cal.4th at page 366. In short, defense counsel's failure to object to the prosecutor's

comments did not prejudice Abegg, since the jury would have followed the court's instructions on the law, not what we have assumed to be misstatements by the prosecutor.

For these reasons, in this direct appeal from the judgment, Abegg did not meet his burden of establishing a claim for ineffective assistance of counsel based on his trial attorney's failure to have objected to what we have assumed—for the purposes of this part III.B. of the opinion only—to be the prosecutor's error in misstating the law during his closing argument.

#### IV. DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.